117 525

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 243.

THE FORT LEAVENWORTH RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

PERCIVIL G. LOWE, SHERIFF OF THE COUNTY OF LEAVENWORTH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JULY 21, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 243.

THE FORT LEAVENWORTH RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

PERCIVIL G. LOWE, SHERIFF OF THE COUNTY OF LEAVENWORTH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from Dist. Ct. of the Co. of Leavenworth	2	1
Petition	2	1
Precipe for summons	3	2
Sheriff's return on tax warrant	3	3
Tax warrant	4	4
Summons	4	4
Return to summons	5	4
Demurrer	5	5
Judgment	6	6
Clerk's certificate	6	6
Petition in error	8	7
Appearance	8	7
Cause taken under advertisement	9	8
Judgment	10	8
Syllabus	12	9
Opinion	13	9

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Amended judgment	18	14
Clerk's certificate	20	15
Citation	21	15
Proof of service	22	15
Bond	23	16
Writ of error	25	16

1 Be it remembered that on the twenty-fourth day of December, A. D. 1881, there was filed in the office of the clerk of the supreme court of the State of Kansas a certified copy of the pleadings and record in the above-entitled cause, from the district court of the county of Leavenworth, which said copy is in the words and figures as follows, to wit:

2 EXHIBIT "A."

Petition.

STATE OF KANSAS, } *ss:*
Leavenworth County, }

In the District Court in the County of Leavenworth, in the State of Kansas.

THE FORT LEAVENWORTH RAILROAD COMPANY, Plaintiff,
vs.
PERCIVAL G. LOWE, Sheriff of the County of Leavenworth Defendant.

The said plaintiff, The Fort Leavenworth Railroad Company, a corporation duly organized and existing under the laws of the State of Kansas, complains of Percival G. Lowe, sheriff of the county of Leavenworth, the defendant herein, for that said plaintiff now is and for the three years last past has been the owner and in the possession of the railroad known as the Fort Leavenworth Railroad, the track, road-bed, water and fuel station, buildings, machinery, rolling-stock, telegraph lines, and all material on hand and supplies provided for operating and carrying on the business of said plaintiff, all of which is situate on the Fort Leavenworth military reservation mentioned and described in the act of the Legislature of the State of Kansas, approved February 25th, 1875.

And said plaintiff further avers that said railroad was built, constructed, and operated by and with the consent, acquiescence, and permission of the Government of the United States on said military reservation.

And said plaintiff further avers that said Government of the United States accepted the rights and privileges, and has ever since exercised such right and privileges as were given under said act of the Legislature of the State of Kansas, approved February 25, 1875.

Said plaintiff further avers that the board of railroad assessors of the State of Kansas met on the 19th day of April, A. D. 1880, at the office of the auditor of State of the State of Kansas, and then and there ascertained that said plaintiff had two miles of main track, right of way, franchises, road-bed, telegraph line and instruments connected therewith on said military reservation, and then and there assessed and valued the same at eight thousand dollars per mile. Total average value, sixteen thousand dollars.

That afterwards, and on the 18th day of May, A. D. 1880, said board of assessors duly made return to J. W. Niehaus, the county clerk of said county of Leavenworth, of such valuation.

	Original.	Print.
Amended judgment	18	14
Clerk's certificate	20	15
Citation	21	15
Proof of service	22	15
Bond	23	16
Writ of error	25	16

1 Be it remembered that on the twenty-fourth day of December, A. D. 1881, there was filed in the office of the clerk of the supreme court of the State of Kansas a certified copy of the pleadings and record in the above-entitled cause, from the district court of the county of Leavenworth, which said copy is in the words and figures as follows, to wit:

2 EXHIBIT "A."

Petition.

STATE OF KANSAS, } ss:
Leavenworth County, }

In the District Court in the County of Leavenworth, in the State of Kansas.

THE FORT LEAVENWORTH RAILROAD COMPANY, Plaintiff,
vs.
PERCIVAL G. LOWE, Sheriff of the County of Leavenworth Defendant.

The said plaintiff, The Fort Leavenworth Railroad Company, a corporation duly organized and existing under the laws of the State of Kansas, complains of Percival G. Lowe, sheriff of the county of Leavenworth, the defendant herein, for that said plaintiff now is and for the three years last past has been the owner and in the possession of the railroad known as the Fort Leavenworth Railroad, the track, road-bed, water and fuel station, buildings, machinery, rolling-stock, telegraph lines, and all material on hand and supplies provided for operating and carrying on the business of said plaintiff, all of which is situate on the Fort Leavenworth military reservation mentioned and described in the act of the Legislature of the State of Kansas, approved February 25th, 1875.

And said plaintiff further avers that said railroad was built, constructed, and operated by and with the consent, acquiescence, and permission of the Government of the United States on said military reservation.

And said plaintiff further avers that said Government of the United States accepted the rights and privileges, and has ever since exercised such right and privileges as were given under said act of the Legislature of the State of Kansas, approved February 25, 1875.

Said plaintiff further avers that the board of railroad assessors of the State of Kansas met on the 19th day of April, A. D. 1880, at the office of the auditor of State of the State of Kansas, and then and there ascertained that said plaintiff had two miles of main track, right of way, franchises, road-bed, telegraph line and instruments connected therewith on said military reservation, and then and there assessed and valued the same at eight thousand dollars per mile. Total average value, sixteen thousand dollars.

That afterwards, and on the 18th day of May, A. D. 1880, said board of assessors duly made return to J. W. Niehaus, the county clerk of said county of Leavenworth, of such valuation.

And that said county clerk duly placed such assessment on the proper tax-roll of said county of Leavenworth, subject to the same per cent. of levy for different purposes as in other property.

And that there was levied for said year A. D. 1880 a large amount of taxes, to wit, $394.40, on and against the last-mentioned property.

And said plaintiff further avers that afterwards, to wit, and on the 17th day of August, A. D. 1881, Enos Hook, the county treasurer of said county of Leavenworth, by E. Krezdorn, his deputy, duly issued and delivered to said defendant a tax warrant against said plaintiff, commanding said defendant, among other things, to levy the amount of said unpaid taxes, together with the penalty and costs thereon and said defendant's fees for collecting the same, of the goods and chattels of said plaintiff, a copy of which said tax warrant, together with the return of said defendant herein endorsed thereon, is herewith filed, hereto attached, marked Exhibit No. 1, and made part hereof.

3 And said plaintiff further avers that afterwards, to wit, and on the 24th day of August, A. D. 1881, said defendant, as such sheriff, then and there, upon said military reservation, levied said tax warrant upon and took possession of the station-house or freight depot, the property of said plaintiff.

Whereby and to save said plaintiff from great loss and irreparable damages and to keep said property from being sold, destroyed, and lost to this plaintiff, to regain possession and to have said Co. released so wrongfully taken, it was compelled to, and did, under protest and objection, and then declaring to said sheriff that said tax was illegal and void, and that it would institute suit against him to recover the amount thereof back, pay to said defendant, as such sheriff, the sum of four hundred and twenty and 30-100 dollars, to the damage of this plaintiff in the sum of four hundred and twenty and 30-100 dollars.

And said plaintiff further avers that all of the property of said plaintiff is now, and always has been, situate on said Fort Leavenworth military reservation; that said property is and was exempt from taxation, and that the State of Kansas or any person had no jurisdiction to assess said property or any thereof for taxation, or to levy or collect taxes thereon; and that said tax is illegal and void.

Wherefore said plaintiff prays and demands judgment against said defendant for the sum of four hundred and twenty and 30-100 dollars, together with interest thereon from said 24th day of August, A. D. 1881, at the rate of 7 per cent. per annum, and for costs of suit, &c.

M. A. LOW AND J. D. SHAFER,
Attorneys for Plaintiff.

The clerk of the above-named district court will please issue a summons against the defendant in the above-entitled suit, directed to the coroner of said county of Leavenworth to serve, &c., returnable according to law.

Plaintiff claims judgment for $420.30, with interest thereon from

the 24th day of August, A. D. 1881, at the rate of 7 per cent. per annum, and for costs of suit, &c.

M. A. LOW AND J. D. SHAFER,
Attorneys for Plaintiff.

I received this tax warrant on the 17th day of August, 1881, at 3½ o'clock p. m. of that day; and afterwards, on the advice and under instructions of Wm. Dill, county attorney of Leavenworth county, Kansas, I executed the same by going on the Fort Leavenworth military reservation and by levying upon and taking possession of the station-house or freight depot as the property of the within-named railroad on said military reservation, and thereupon J. D. Shafer paid to me for said railroad the sum of four hundred and fourteen 37-100 dollars, in full of amount said to be due the county of Leavenworth on said warrant, and five 93-100 dollars, the amount of my costs; and I further state and return that said Shafer, for said railroad, protested against said levy, and served a paper on me, so protesting, which paper is hereto attached; and after having received the aforesaid money in full payment as aforesaid, I released the levy on said station-house, leaving the same in like condition as when levied upon, without damage thereto, and without injury or annoyance to said railroad, and without advertising or selling the same.

P. G. LOWE,
Sheriff of Leavenworth County, Kansas.

Fees:

Tax warrant	50
Levy	50
Mileage	30
Percentage	4 63
Total	$5 93

4 I, now here, for the Fort Leavenworth Railroad Company, at the time of paying the amount called for in the tax warrant held by you against said company, and by virtue of which you have levied on and taken possession of the property of said company, protest against making such payment, and have always protested, and declare that said tax is and was illegal and void, and that all the property of said company is and was situate on the Fort Leavenworth military reservation, and that the State of Kansas has not and never had any jurisdiction to assess said property for taxation or to levy or collect taxes thereon. And that said company will sue you to recover back the taxes, penalties and costs.

And that it makes the payment solely to prevent a sale of its property, which you have seized and taken possession of, as aforesaid, to satisfy the said tax warrant.

J. D. SHAFER.

August 24, A. D. 1881.

STATE OF KANSAS, } ss:
Leavenworth County, }

To the sheriff of Leavenworth county: No. 4.

Whereas the taxes on personal property assessed against Fort Leavenworth Railroad for the year A. D. 1880 remain due and unpaid, together with the penalty and costs thereon, as herein specified, to wit:

Taxes	$394 40
Penalty	19 72
Warrant	25
Total	$414 37

You are therefore commanded to levy the amount of said unpaid taxes, together with the penalty and costs thereon, and your fees for collecting the same, of the goods and chattels of the said Fort Leavenworth Railroad, and when you have so collected the taxes and penalty, you are to pay the same to the treasurer of Leavenworth county. You will make due return of this warrant within sixty days from date hereof.

In witness whereof, I, Enos Hook, treasurer of Leavenworth county, State of Kansas, have hereunto set my hand and affixed the seal of my office, this 17th day of August, A. D. 1881.

[SEAL.] ENOS HOOK,
County Treasurer,
By E. KREZDORN,
Dep'y County Treas.

Kuk tp.	$8 00
School No. 55	40
Road No. —	40

(Endorsed:) No. 4. $414.37. Kuk township. Tax warrant. Ft. Leavenworth Railroad. Issued August 17th, 1881. Returned Oct. 17th, 1881. Filed this 29th day of August, A. D. 1881. Enos Hook, county treasurer, by E. Krezdorn, deputy county treasurer. The Fort Leavenworth Railroad Company *vs.* Percival G. Lowe, sheriff, &c. No. 8164. Petition, precipe, &c. Filed August 29, 1881. McCown Hunt, clerk, by Chas. Crouse, D. C.

UNITED STATES OF AMERICA:

STATE OF KANSAS, } ss:
First Judicial District, Leavenworth County, }

The State of Kansas to the coroner of Leavenworth county, in said State, Greeting:

You are hereby commanded to notify Percival G. Lowe, sheriff of the county of Leavenworth, that he has been sued by the Fort Leavenworth Railroad Company, in the district court sitting
5 in and for said county of Leavenworth, and that unless he answer by the 28th day of September, A. D. 1881, the petition

of the said The Fort Leavenworth Railroad Company against him filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 8th day of September, A. D. 1881.

Witness my hand and the seal of said court affixed, at my office in the city of Leavenworth, this 29th day of August, A. D. 1881.

[SEAL.] McCOWN HUNT, *Clerk.*
By CHAS. CROUSE, *Deputy Clerk.*

(Endorsed:) Summons. Page 33, No. 8164, docket 14. District court, Leavenworth county, Kansas. The Fort Leavenworth Railroad Company *vs.* Percival G. Lowe, sheriff, &c. Issued August 29, 1881. Returnable Sept. 8th, 1881. M. A. Low and J. D. Shafer, plaintiff's attorneys. Filed this 29th day of August, A. D. 1881. McCown Hunt, clerk, by Chas. Crouse, deputy clerk.

I received this summons on the 29th day of August, A. D. 1881 at 10½ o'clock a. m. of that day, and I served the same summons in my county of Leavenworth, Kansas, on the within-named defendant, Percival G. Lowe, sheriff of the county of Leavenworth, by delivering to him personally a copy thereof with all the endorsements thereon on the said 29th day of August, 1881.

JOHN C. LYNCH,
Coroner of Leavenworth County, Kansas.

Fees:

Service	50
Copies	25
Total	75

Suit brought for the recovery of money, amount claimed $420.30, with interest from the 24th day of August, 1881, at the rate of 7 per cent. per annum, and for costs of suit, &c.

M. A. LOW & J. D. SHAFER,
Attorneys for Plaintiff.

Demurrer.

THE STATE OF KANSAS, } ss:
Leavenworth County, }

In the District Court in the County of Leavenworth, in the State of Kansas.

THE FORT LEAVENWORTH RAILROAD COMPANY, Plaintiff,
vs.
PERCIVAL G. LOWE, Sheriff of the County of Leavenworth, Defendant.

Now comes the said defendant, Percival G. Lowe, sheriff of the county of Leavenworth, and demurs to the petition of the said plaintiff, The Fort Leavenworth Railroad Company, in this the above-entitled action, because he says:

First. The said petition does not state facts sufficient to constitute a cause of action.

WM. DILL, *Attorney for Def't.*

(Endorsed:) No. 8164. The Forth Leavenworth R. R. Co. *vs.* P. G. Lowe. Demurrer to petition. Filed August 30th, 1881. McCown Hunt, clerk, by Chas. Crouse, D. C. Wm. Dill, for def't.

UNITED STATES OF AMERICA:

6 Be it remembered that at the December term, A. D. 1881, of the district court of the first judicial district of the State of Kansas, sitting within and for the county of Leavenworth, in said State, begun and held in the city of Leavenworth, commencing on Monday, the 5th day of December, A. D. 1881—present, the Honorable Robert Crozier, judge; P. G. Lowe, sheriff of Leavenworth county, Kansas, and McCown Hunt, clerk—the following proceedings were had, to wit:

MONDAY, *December 5th*, A. D. 1881.

Court met pursuant to adjournment. Present as before:

THE FORT LEAVENWORTH RAILROAD COMPANY, Plaintiff,
vs.
PERCIVAL G. LOWE, Sheriff of the County of Leavenworth, Defendant. } No. 8164.

This day came the said plaintiff by M. A. Low, J. D. Shafer, and H. W. Ide, its attorneys, and also came the defendant by William Dill, county attorney in and for the county of Leavenworth, and the demurrer to plaintiff's petition heretofore filed herein by said defendant came on to be heard, and the court having heard the argument of counsel, and being fully advised in the premises, sustains said demurrer, and said plaintiff decling to amend said petition, it is considered, ordered, and adjudged by the court that said defendant go hence, without day, and that he have and recover of said plaintiff his costs in this behalf laid out and expended, taxed at —— dollars.

To which ruling, decision, and judgment of the court, said plaintiff, by its attorneys, then and there excepted.

STATE OF KANSAS, }
Leavenworth County, } *ss:*

I, McCown Hunt, clerk of the district court of the first judicial district of the State of Kansas, sitting within and for the county aforesaid, do hereby certify the above and foregoing to be true, full, and complete copies of petition and endorsements, summons and endorsements, demurrer and endorsements, and judgment entry in the therein entitled cause, as the same remains on file and of record in my office.

Witness my hand and the seal of said court affixed at my office in the city of Leavenworth, this the 10th day of December, A. D. 1881.

[L. S.]

McCOWN HUNT, *Clerk,*
By CHAS. CROUSE, *Deputy Clerk.*

Cost of transcript, $2.35; paid by J. D. Shafer for plaintiff.

McCOWN HUNT, *Clerk*,
By CHAS. CROUSE, *D. C.*

(Endorsed:) 2457. Petition in error. No. 8164. District court, Leavenworth county, Kansas. Ft. Leav'th R. R. Co. *vs.* Percival G. Lowe, sheriff &c. Transcript. Filed Dec. 24, 1881. C. J. Brown, clerk supreme court. M. A. Low and J. D. Shafer, attorneys.

7 And also on, to wit, the twenty-fourth day of December, A. D. 1881, there was filed in the office of the clerk of the supreme court of the State of Kansas, a petition in error in the above cause, which is in words and figures as follows, to wit:

8 *Petition in Error.*

In the Supreme Court for the State of Kansas.

THE FORT LEAVENWORTH RAILROAD COMPANY, Plaintiff,
vs.
PERCIVAL G. LOWE, Sheriff of the County of Leavenworth, Defendant.

The said plaintiff, the Fort Leavenworth Railroad Company, complains of the said defendant Percival G. Lowe, sheriff of the county of Leavenworth, for that the said defendant at the December term, A. D. 1881, of the district court in the county of Leavenworth, in the State of Kansas, and on the 5th day of December, A. D. 1881, recovered a judgment by the consideration of said district court against said plaintiff in a certain action then pending therein, wherein said plaintiff was plaintiff and said defendant was defendant, a copy of the record of ruling, decision, judgment and proceedings in which case, duly certified, is hereto attached, marked Exhibit "A," and made a part of this petition.

And the said plaintiff avers that there is error in the said record and proceedings in this, to wit:

First. That the said district court erred in sustaining the demurrer of said defendant for the petition of said plaintiff.

Second. That said court erred in rendering judgment against said plaintiff and in favor of said defendant.

Wherefore the said plaintiff prays that said judgment, ruling, and decision of the said district court may be reversed, and for such other and further relief as it may be entitled to, and for costs of suit, &c.

M. A. LOW,
J. D. SHAFER, AND
H. W. IDE,
Attorneys for Plaintiff in Error.

Issuing and serving of a summons is hereby waived, and I hereby enter my appearance in this court in the above-entitled suit, this 22nd day of December, A. D. 1881.

WM. DILL,
Co. Att'y Leavenworth Co., Kansas, for Def't.

Filed Dec. 24, 1881.

C. J. BROWN,
Clerk Supreme Court.

9 And afterwards on, to wit, the 9th day of March, 1882, the same being one of the regular judicial days of the January term, A. D. 1882, of the supreme court of the State of Kansas, before said court in session at the supreme court room, in the city of Topeka.

Present: Hon. Albert H. Horton, chief justice; Hon. Daniel M. Valentine and Hon David J. Brewer, associate justices, and C. J. Brown, clerk of said court.

The following proceeding, among other, was had and entered of record on page seventy-three of journal "I," as follows, to wit:

FORT LEAVENWORTH RAILROAD COMPANY, Plaintiff in Error,
vs.
P. G. LOWE, Sheriff, Defendant in Error.

This cause came on to be heard on petition in error and transcript of the record of the district court of Leavenworth county, and, after argument by M. A. Low, counsel for plaintiff in error, and W. A. Johnston and William Dill, counsel for defendant in error, was submitted on briefs of counsel for both parties and taken under advisement by the court.

10 And afterwards on, to wit, the fourth day of May, 1882, the same being one of the regular judicial days of the January term A. D. 1882, of the supreme court of the State of Kansas, before said court in session at the supreme court room, in the city of Topeka, present Hon. Albert H. Horton, chief justice, Hon. Daniel M. Valentine and Hon. David J. Brewer, associate justices, and C. J. Brown, clerk of said court. The following proceeding, among others, was had and entered of record on page one hundred and thirty-five of Journal "I," as follows, to wit:

FORT LEAVENWORTH RAILROAD COMPANY, Plaintiff in Error,
vs.
P. G. LOWE, Sheriff, Defendant in Error.

This cause came on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed with costs, and hereof let execution issue.

Valentine, J., delivered the opinion of the court, all the justices concurring.

11 And also on, to wit, the fourth day of May, A. D. 1882, the same being one of the regular judicial days of the January term A. D. 1882 of the supreme court of the State of Kansas, there was filed in the office of the clerk of said court the syllabus and opinion of the court in said cause, copies of which are hereunto annexed in words and figures as follows, to wit:

12 *Syllabus.*

THE FORT LEAVENWORTH RAILROAD COMPANY
vs.
PERCIVAL G. LOWE, Sheriff of the County of Leavenworth. } 2457.

Error from Leavenworth county. Affirmed.

By the court, VALENTINE, J.:

The State of Kansas has power and authority to tax railroad property belonging to a private corporation, situated exclusively within the boundaries of the Fort Leavenworth military reservation.

All the justices concurring.

A true copy. Attest:

_____, *Clerk Supreme Court.*

13 THE FORT LEAVENWORTH RAILROAD COMPANY
vs.
PERCIVAL G. LOWE, Sheriff of the County of Leavenworth. } 2457.

The opinion of the court was delivered by Valentine, J.:

The main, if not the sole, question involved in this controversy is, whether the State of Kansas, as an act of sovereignty, or in the exercise of a mere license or privilege, conferred upon it by the General Government of the United States, may tax railroad property belonging to a private corporation, situated exclusively within the boundaries of the Fort Leavenworth military reservation in Kansas.

The territory now known as the Fort Leavenworth military reservation is a portion of that vast territory which, in 1803, was ceded by France to the Government of the United States; and the territory now constituting such military reservation has belonged to the Government of the United States ever since the said cession from France; and from that time up to January 29, 1861, the General Government of the United States has had the sole and exclusive dominion and control over it, not only as the proprietor and owner of the soil, but also as the sovereign and supreme ruler of the country. But on January 29, 1861, the Government of the United States parted with its exclusive jurisdiction over it, and conferred jurisdiction, sovereignty, and dominion over the same upon the State of Kansas. In other words, on January 29, 1861, the General Government admitted the State of Kansas into the Union as a sovereign and independent State; and by such admission the sovereignty over this military reservation was transferred from the General Government to the State of Kansas. This is admitted by all parties. Of course,

the General Government, in admitting Kansas into the Union, might have excepted this military reservation from the boundaries of the State, if it had so chosen; but it did not so choose. It might have reserved to itself the absolute sovereignty and dominion over this military reservation, if it had so chosen; but it did not so choose. It admitted Kansas into the Union upon the same footing as the original States; and by such admission placed this military reservation within the unquestioned sovereignty and dominion of the State of Kansas. Of course, the General Government still retained and now retains the ownership of the soil; it still has the right to use the territory as a military post, or to dispose of it in any other manner which it may see fit; and its right to so use the territory or to dispose of it does not conflict with any provision of either the Federal Constitution or the State constitution, or with the unquestioned and rightful sovereignty and jurisdiction of the State of Kansas. The Federal Government has contined to use such territory as a military post up to the present time.

From January 29, 1861, up to February 22, 1875, it is admitted that the sovereignty and jurisdiction of the State of Kansas over the military reservation was complete, and precisely the same as it was over every other portion of the territory of Kansas; and the State had the right to tax any property found on such territory which it could legally have taxed if the property had been found any where else within the boundaries of the State. But on February 22, 1875, the Legislature of the State of Kansas passed the following act, to wit:

"SEC. 1. That exclusive jurisdiction be and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth reservation, in said State, as declared from time to time by the President of the United States, saving, however, to the said State the
14 right to serve civil or original process within said reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of said cession and reservation; and saving further, to said State, the right to tax railroad, bridge, and other corporations, their franchises and property, on said reservation."

(Laws of 1875, p. 95; Comp. Laws of 1879, p. 515.)

It does not appear that this act of the Legislature was passed at the solicitation, or even at the suggestion, of any officer or officers of the United States; but even if it had been, still such solicitation or suggestion would have been absolutely and utterly nugatory for all legal purposes, unless it came from some officer or officers exercising the sovereign power and authority of the General Government. Neither does it appear that this act of the Legislature has ever been accepted by the Government of the United States. It is true that the plaintiff's petition alleges that the Government has accepted all the rights and privileges attempted to be conferred by such act. But "neither presumptions of law nor matters of which judicial notice is taken need be stated in the pleading." (Civil Code, sec. 130.) And

if the same should be stated, whether correctly or incorrectly, the statement amounts to nothing. The transferrence of sovereign jurisdiction from one government to another, whether done by the supreme legislative power or the supreme executive power of the two governments, or by both of such powers combined, is a matter of such transcendent importance, and of such great public concern, that the courts of each government should take judicial notice thereof. And hence an allegation in a pleading of the facts of such transferrence amounts to nothing. It is also true that the General Government occupies this military reservation as a military post; but this it has done for fifty years, and without the slightest reference to the said act of the Legislature of Kansas. An acceptance of an act of the Legislature of a State (such an act as the one in controversy) probably requires an act of Congress, or at least an executive proclamation. But if, however, we should say that presumptions are sufficient, and say that, presumably, the General Government has accepted this act of the Legislature of Kansas because beneficial to it, or for any other reason, then we should also say that, in all fairness and justice to the people of the State of Kansas, the General Government has accepted the act in its very letter and spirit, with all its exceptions and limitations; with all its saving clauses and reservations. But it is said that the General Government cannot accept the act in any such manner; and section 8, article 1, of the Constitution of the United States, is interposed as a conclusive argument that no such acceptance can take place. Said section 8, article 1, of the Constitution, so far as it is necessary to quote it, reads as follows:

"SEC. 8. The Congress shall have power * * * to exercise exclusive legislatian, in all cases whatsoever, over such District (not exceeding ten miles square), as may by session of particular States and the acceptance of Congress become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

Now this section of the Constitution does not seem to be applicable to the present case. It provides that "the Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever * * * over all places purchased by the consent of the Legislature of the State in which the same shall be," &c.

15 Now, (1), "the Congress" has never chosen "to exercise exclusive legislation" over the military reservation in question. On the contrary, it has chosen not to do so, for it admitted Kansas into the Union with such reservation, and thereby gave to the State of Kansas the unquestioned power to exercise legislation and jurisdiction over such military reservation, and Congress has never changed its will or intention in this respect. (2.) The territory occupied as a military post has never been "purchased by the consent of the Legislature of the State in which the same" is situated. (3.) Nor has the Legislature of Kansas ever consented that "the Congress" of the United States, or any other body of men, or

officer or officers of the United States, shall "exercise exclusive legislation" or exclusive jurisdiction over said military reservation. The supposed exclusive jurisdiction that the legislature of Kansas ceded to the General Government, was a jurisdiction with exceptions and limitations, and with reservations to the State of Kansas; and hence, it was not a general or exclusive jurisdiction that was so ceded. It will, therefore, be seen that unless this provision of the Constitution of the United States is stretched much beyond its literal terms, it cannot be made to cover the present case, or to oust the State of Kansas from exercising the jurisdiction which it reserved to itself, or to prevent it from exercising the power of taxation upon railroad property belonging to private corporations, situated on the said military reservation.

It is not claimed that the constitution of Kansas authorizes any cession or transfer of jurisdiction over any of the territory of Kansas. No power to abandon sovereignty or to abdicate government can be found in the constitution of Kansas. If any such power exists, it must be found in said Section 8, Article 1, of the Federal Constitution. But that section does not meet the present case. The Legislature has not consented to any purchase in the present case; nor has it consented to abandon jurisdiction to tax railroad property on the Fort Leavenworth military reservation. Nor has Congress consented to exercise exclusive legislation over such military reservation. But, in order to make said section apply to the present case, it is proposed to change its terms in the following material respects, to wit: Instead of allowing the section to read as it now does, that "the Congress shall have power to exercise exclusive legislation over all places purchased by the consent of the Legislature of the State," &c., it is proposed to change it so that it shall read as follows: "The General Government shall have the power to exercise, and, in all cases, shall (whether it consents or not) exercise exclusive jurisdiction over all places where the exercise of any portion of such jurisdiction has been consented to by the Legislature of the State," &c.

Now, if the Constitution of the United States is embodied in such elastic terms that it may be so stretched and changed as to cover cases wholly beyond and outside of its express terms, may it not also be so stretched and changed as to do exact justice and carry out the will and intention of the contracting parties under it? The stretch in the latter case is certainly not greater than that in the former.

We suppose that the General Government in cases like this can take just what the State proposes to give it, and nothing more. It is not necessary that the General Government should have exclusive jurisdiction over military reservations; for from 1861 to 1875 the General Government did not have any such exclusive jurisdiction over the military reservation in question, but the sovereign jurisdiction over such reservation during all that time was wholly within the State of Kansas; and yet no serious inconvenience was experienced because of such want of jurisdiction in the Federal
16 Government. But it is said that the General Government cannot accept partial jurisdiction; that it must have all or none.

Now, if this be true, then we should think that it has not received any jurisdiction, but that the entire jurisdiction over the reservation still remains in the State of Kanas. But why should it be so as claimed? If Congress has the power (mark the words: "The Congress shall have power") to accept the entire jurisdiction over the ceded territory, why may it not accept a portion of such jurisdiction? And if the Legislature has the power to cede away the whole of the jurisdiction of the State, over any portion of the territory of a State, why may it not cede away a portion of such jurisdiction? The whole always includes all its parts. It would seem that any legislative body that has the power to do or accept the whole of a thing should have the power to do or accept a portion of such thing. Where all power can be conferred upon a legislative body, what insuperable objection can there be to conferring a portion of such power upon such body? But, as before stated, if the General Government cannot and has not taken a portion only of the jurisdiction over the Fort Leavenworth military reservation, then we do not think that it has taken anything; and the attempted cessation by the Legislature of Kansas is a nullity.

It would seem, under section 8, Article I, of the Federal Constitution, that Congress should take some action before jurisdiction can pass from the State to the Federal Government, for the Legislature of the State certainly cannot, of its own volition, cut off territory from the State and force it into the jurisdiction of the Federal Government against the consent of Congress, or else place such territory beyond the operation of all law and outside of all jurisdiction. The Legislature may act; it may propose a cession of territory; but the territory intended to be ceded will remain within the jurisdiction of the State until Congress acts and until Congress consents that the territory shall pass into the jurisdiction of the Federal Government. It takes two parties to make a contract, and it takes the action of both the State government and the Federal Government before jurisdiction can be transferred from the State government to the Federal Government; and, so far as is shown in the present case, only one party has acted—the State of Kansas. So far as is shown in the present case, "The Congress" has not yet shown a willingness "to exercise exclusive legislation" over the ceded territory; but, as we have before said, the last act of Congress upon the subject shows an unwillingness on the part of Congress to exercise such exclusive legislation or jurisdiction over such territory. The act of the Legislature in the present case is not like contract, executed or otherwise, where one of the parties has expended a large amount of labor or money, which he must lose unless the contract is enforced, for in the present case nothing has been done because of such act of the Legislature; the General Government has not parted with anything, nor has it changed its condition because of such act. Besides, the thing proposed to be ceded by such act of the Legislature is unimportant to the State of Kansas in comparison with the thing intended to be retained. The State of Kansas had no power prior to the passage of the act, nor has it had since, to tax the military reservation or anything belonging to the United States thereon, but it had the

power to tax the vast amount of railroad and bridge property which was then and is now situated upon said military reservation. Hence the thing attempted to be ceded by the Legislature of Kansas had but little importance to the State of Kansas in comparison with the thing intended to be retained by the Legislature; and for this reason, if for no other, it should not be held that all jurisdiction passed from the State of Kansas without its consent. If, under said section of the Federal Constitution, it must be held either that all juris-
17 diction passed from the State of Kansas, or that nothing passed, then it certainly should be held that nothing passed.

We think that the State of Kansas has power and authority to tax railroad property belonging to a private corporation situated exclusively within the boundaries of the Fort Leavenworth military reservation, and this is all that we now wish to decide. We do not desire to decide specifically just what the civil and political status of the Fort Leavenworth military reservation is, or what it may be in the future, if the Congress of the United States shall take action upon the afore-mentioned act of the Legislature of Kansas. But in any event we should think that the State of Kansas should have power to tax the property aforementioned. To say that it should not have such power is to deprive the State of Kansas of such power and jurisdiction, not only without its consent, but against its consent; and we can scarcely think that the Constitution of the United States will authorize or even tolerate any such thing.

The authorities will be found cited in counsels' briefs. We would, however, cite: *In re* O'Connor, 37 Wis., 379; U. S. *v.* Cornell, 2 Mason, 60, 66.

The judgment of the court below will be affirmed.

All the justices concurring.

A true copy. Attest:

_____,

Clerk Supreme Court.

18 And afterwards, on to wit, the eighth day of June, A. D. 1882, the same being one of the regular judicial days of the January term, A. D. 1882, of the supreme court of the State of Kansas, before said court in session at the supreme court-room in the city of Topeka.—present, Hon. Albert H. Horton, chief justice; Hon. Daniel M. Valentine, and Hon. David J. Brewer, associates justices, and C. J. Brown, clerk of said court—the following proceedings, among others, was had and entered of record on page one hundred and sixty-seven of journal "1," as follows, to wit:

FORT LEAVENWORTH RAILROAD COMPANY, Plaintiff in Error,

vs.

P. G. LOWE, Sheriff, Defendant in Error.

Now on this day come the parties herein, by their attorneys, and it is thereupon ordered and adjudged by the court that the judgment heretofore entered in this cause by the clerk of this court, be amended and entered now for then, so as to read as follows: This

cause coming on for judgment, and the court being fully advised in the premises, doth adjudge that the State of Kansas has jurisdiction to tax railroad corporations, their property and franchises, within the limits of the military reservation described in the act of
19 the Legislature of the State of Kansas, entitled "An act to cede jurisdiction to the United States over the territory of the Fort Leavenworth military reservation," approved February 22d, 1875, and that this was a question in issue, and necessary to be adjudicated in this case. Wherefore there is no error in the proceedings and judgment of the said district court of Leavenworth county in this cause. It is therefore considered by the court that the judgment of said district court in this cause rendered be, and the same is, in all things affirmed, and that the said defendant in error recover of the said plaintiff in error his costs in this behalf laid out and expended, and that he have thereof execution.

Opinion filed.

20 STATE OF KANSAS, }
Supreme Court, } *ss:*

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a true and complete copy of the pleadings of the record of proceedings had, of the judgment rendered, and of the syllabus and opinion filed in the above-entitled cause, as the same remain of record and on file in my office.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the supreme court of the State of Kansas, at my office, in Topeka, Kansas, this twenty-sixth day of June, A. D. 1882.

[SEAL.] C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

21 The United States of America to Percival G. Lowe, sheriff of Leavenworth county, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein The Fort Leavenworth Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Albert H. Horton, presiding judge of the supreme court of Kansas, this 16th day of June, A. D. 1882.

ALBERT H. HORTON,
Presiding Judge Supreme Court, State of Kansas.

22 I hereby acknowledge service of the within citation by serving of a copy thereof on this 19 day of June, A. D. 1882.

P. G. LOWE,
Sheriff, &c., Def't in Error.

[Endorsed:] The Fort Leavenworth Railroad Co., pl'ff in error, *vs.* Percival G. Lowe, sheriff, &c., def't in error. Citation. Filed Jun. 21, 1882. C. J. Brown, clerk sup. court.

23 Supreme Court of the United States.

THE FORT LEAVENWORTH RAILROAD COMPANY
vs.
PERCIVAL G. LOWE, Sheriff of the County of Leavenworth.

Know all men by these presents, that we, The Fort Leavenworth Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Kansas, and H. W. Ide, of Leavenworth, Kansas, are held and firmly bound unto Percival G. Lowe, sheriff of the county of Leavenworth, Kansas, in the sum of five hundred ($500) dollars, to be paid to the said Percival G. Lowe, sheriff of the county of Leavenworth, State of Kansas, his successors in office, executors, or administrstors; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, successors, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this 8th day of June, 1882.

Whereas the above-named The Fort Leavenworth Railroad Company hath prosecuted a writ of error to the Supreme Court
24 of the United States, to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Kansas:

Now, therefore, the condition of this obligation is such, that if the above-named The Fort Leavenworth Railroad Company shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

THE FORT LEAVENWORTH RAILROAD COMPANY,
By HUGH RIDDLE, *President.*

Attest: [SEAL.] THOS. H. CLUTHROW, *Secretary.*
H. W. IDE. [SEAL.]

Accepted and approved June 8th, 1882.
ALBERT H. HORTON,
Chief Justice of the State of Kansas.

[Endorsed:] Filed Jun. 21, 1882. C. J. Brown, clerk sup. court.

25 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Kansas, before you, being the highest court of law or equity of said State in which a decision could be had, in the said suit between the Fort Leavenworth Railroad Company, plaintiffs in error, and Percival

G. Lowe, Sheriff of Leavenworth County, defendant in error, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, a manifest error hath happened, to the great damage of the said The Fort Leavenworth Railroad Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 15 day of June, A. D. 1882.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed by— ALBERT H. HORTON,
Chief Justice of the Supreme Court of Kansas.

[Endorsed:] No. —. The Fort Leavenworth Railroad Co., pl'ff in error, *vs.* Percival G. Lowe, sheriff, &c., def't in error. Writ of error. Filed Jun. 21, 1882. C. J. Brown, clerk sup. court.

Endorsed on cover: Kansas sup. court. No. 243. The Fort Leavenworth Railroad Company, plaintiff in error, *vs.* Percival G. Lowe, sheriff of the county of Leavenworth. Filed 21st July, 1882.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

FORT LEAVENWORTH RAILROAD COMPANY,
Plaintiff in Error,

vs.

PERCIVAL G. LOWE, SHERIFF OF THE COUNTY OF LEAVENWORTH,
Defendant in Error.

No. 243.

In error to the Supreme Court of the State of Kansas.

Statement and Brief for Plaintiff in Error.

THOS. F. WITHROW,
M. A. LOW,
FOR PLAINTIFF IN ERROR.

TRENTON:
Republican Steam Book and Job Rooms.
1884.

Supreme Court of the United States.

OCTOBER TERM, 1884.

FORT LEAVENWORTH RAILROAD COMPANY,
Plaintiff in Error,
vs.
PERCIVAL G. LOWE, SHERIFF OF THE COUNTY OF LEAVENWORTH,
Defendant in Error.

No. 243.
In error to the Supreme Court of the State of Kansas.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

This action was instituted by plaintiff in error in the District court of Leavenworth county, Kansas, to recover back certain taxes levied on its railroad, situated wholly within the Fort Leavenworth military reservation, in the state of Kansas. These taxes were paid under protest, to prevent a sale of its property. Plaintiff, in its petition, stated its cause of action, as follows:

The said plaintiff, the Fort Leavenworth Railroad Company, a corporation duly organized and existing under the laws of the state of Kansas, complains of Percival G. Lowe, Sheriff of the county of Leavenworth, the defendent herein, for that said plaintiff now is, and for the three years last past has been, the owner and in the possession

of the railroad known as the Fort Leavenworth railroad, the track, road-bed, water and fuel station, buildings, machinery, rolling-stock, telegraph lines, and all material on hand, and supplies provided for operating and carrying on the business of said plaintiff, all of which is situate on the Fort Leavenworth military reservation, mentioned and described in the act of the legislature of the state of Kansas, approved February 25th, 1875.

And said plaintiff further avers, that said railroad was built, constructed, and operated by and with the consent, acquiescence, and permission of the government of the United States, on said military reservation.

And said plaintiff further avers, that said government of the United States accepted the rights and privileges, and has ever since exercised such rights and privileges, as were given under said act of the legislature of the state of Kansas, approved February 25th, 1875.

Said plaintiff further avers, that the board of railroad assessors of the state of Kansas met on the 19th day of April, A. D., 1880, at the office of the auditor of the state of Kansas, and then and there ascertained that said plaintiff had two miles of main track, right of way, franchises, road-bed telegraph line and instruments connected therewith, on said military reservation, and then and there assessed and valued the same at eight thousand dollars per mile. Total average value, sixteen thousand dollars.

That afterwards, and on the 18th day of May, A. D., 1880, said board of assessors duly made return to J. W. Niehaus, the county clerk of said county of Leavenworth, of such valuation.

And that said county clerk duly placed such assessment on the proper tax-roll of said county of Leavenworth, subject to the same per cent of levy for different purposes as other property.

And that there was levied for said year, A. D., 1880, a large amount of taxes, to-wit: $394.40, on and against the last mentioned property.

And said plaintiff further avers, that afterwards, to-wit, and on the 17th day of August, A. D. 1881, Enos Hook, the county treasurer of said county of Leavenworth, by E. Krezdorn, his deputy, duly issued and delivered to said defendant a tax warrant against said plaintiff, commanding said defendant, among other things, to levy the amount of said unpaid taxes, together with the penalty and costs thereon, and said defendant's fees for collecting the same, of the goods and chattels of said plaintiff, a copy of which said tax warrant, together with the return of said defendant herein endorsed thereon, is herewith filed, hereto attached, marked Exhibit No. 1, and made a part hereof.

And said plaintiff further avers, that afterwards, to-wit, and on the 24th day of August, A. D., 1881, said defendant, as such sheriff, then and there, upon said military reservation, levied said tax warrant upon and took possession of the station-house, or freight depot, the property of said plaintiff.

Whereby, to save said plaintiff from great loss and irreparable damages, and to keep said property from being sold, destroyed, and lost to this plaintiff, to regain possession and to have said company released so wrongfully taken, it was compelled to, and did, under protest and objection, and then declaring to said sheriff that said tax was illegal and void, and that it would institute suit against him to recover the amount thereof back, pay to said defendant, as such sheriff, the sum of four hundred and twenty and 30–100 dollars, to the damage of said plaintiff, in the sum of four hundred and 30–100 dollars.

And said plaintiff further avers, that all of the property of said plaintiff is now, and always has been, situate on the Fort Leavenworth military reservation; that said property is and was exempt from taxation, and that the state of Kansas or any person had no jurisdiction to assess said property or any thereof for taxation, or to levy or collect taxes thereon; and that said tax is illegal and void.

Wherefore said plaintiff prays and demands judgment

against said defendant for the sum of four hundred and twenty and 30-100 dollars, together with interest thereon from said 24th day of August, A. D., 1881, at the rate of 7 per cent. per annum, and for costs of suit, &c. [1]

To this petition the defendant in error demurred, on the ground that it did not state facts sufficient to constitute a cause of action. [2] This demurrer was sustained by the District court, and final judgment was rendered thereon against the plaintiff. [3]

The ruling and judgment of the District court in this cause was afterwards affirmed, on error, by the Supreme court of Kansas, in the following language:

"Now on this day come the parties herein, by their at-"torneys, and it is thereupon ordered and adjudged by the "court that the judgement heretofore entered in this cause "by the clerk of this court, be amended and entered now "for then, so as to read as follows: This cause coming on "for judgment, and the court being fully advised in the "premises, doth adjudge that the state of Kansas has juris-"diction to tax railroad corporations, their property and 'franchises, within the limits of the military reservation "described in the act of the legislature of the state of "Kansas, entitled, 'An act to cede jurisdiction to the United "States over the territory of the Fort Leavenworth mili-"itary reservation,' approved February 22d, 1875, and "that this was a question in issue, and necessary to be "adjudicated in this case. Wherefore there is no error in "the proceedings and judgment of the said District court "of Leavenworth county, in this cause. It is therefore con-"sidered by the court that the judgment of said District "court in this cause rendered, be, and the same is, in all "things affirmed, and that said defendant in error recover "of said plaintiff in error his costs in this behalf laid out and expended, and that he have thereof execution." [4]

[1] Record, 1, fo. 2.
[2] Record, 5, fo. 5.
[3] Record, 6, fo. 6.
[4] Record, 14, fo. 18.

The plaintiff brings the case here by writ of error.

The material portions of the act ceding jurisdiction over the Fort Leavenworth military reservation, are as follows:

"SECTION 1. That exclusive jurisdiction be and the "same is hereby ceded to the United States over and within "all the territory owned by the United States, and included "within the limits of the United States military reservation, "known as the Fort Leavenworth reservation, in said state, "as declared from time to time by the president of the "United States, saving, however, to the said state the right "to serve civil or criminal process within said reservation, in "suits or prosecutions for or on account of rights acquired, "obligations incurred, or crimes committed in said state, "but outside of said cession and reservation; and saving "further, to said state, the right to tax railroad, bridge and "other corporations, their franchises and property, on said "reservation."[1]

ASSIGNMENT OF ERRORS.

There is manifest error in the record and proceedings of the court below, in this:

1. That the court sustained the demurrer to plaintiff's petition.

2. That the court held that the state of Kansas has jurisdiction to tax railroad corporations, their property and franchises, within the limits of the Fort Leavenworth military reservation.

3. That the clause "and saving further, to said state, the right to tax railroad, bridge, and other corporations, their franchises and property, on said reservation," is in violation of that portion of the 8th section of Article 1 of the constitution of the United States, which is in the words following: "Congress shall have power, * * * * *

[1] Laws of Kansas, 1875, p. 95.

"To exercise exclusive legislation in all cases whatsoever, "over such district (not exceeding ten miles square) as may "by cession of particular states, and the acceptance of con- "gress, become the seat of government of the United States, "and to exercise like authority over all places purchased "by the consent of the legislature of the state in which "the same shall be, for the erection of forts, magazines, "arsenals, dock yards, and other needful buildings."

ARGUMENT.

It seems to us that this record presents but one material question for consideration. That question is, *Did the legislature of Kansas, by the act of February 22d, 1875, cede exclusive jurisdiction over the Fort Leavenworth military reservation to the United States?* If the cession was valid all saving clauses, inconsistent therewith, are necessarily void. If congress has exclusive legislative control over that territory, the legislature of the state of Kansas can exercise no legislative control there; and the state cannot levy and collect taxes within such territory, because taxes can only be imposed by sovereign authority. The state of Kansas can only collect taxes by an exercise of legislative control and authority. If it can exercise such control within the limits of this territory, then, congress has not exclusive legislative control thereof, in all cases whatsoever.

The power to cede jurisdiction in such cases is derived from the federal constitution. But one kind of jurisdiction can be granted, and that is exclusive jurisdiction. Any thing short of that is not authorized by the constitution. A state can not, by a saving clause, in such a cession of jurisdiction, modify or in any manner impair the constitutional powers of congress. It may give or withhold its consent to the exercise of exclusive jurisdiction by congress over ceded territory, but it can do no more; that

consent can not be burdened with a reservation repugnant to the constitution of the United States. In the language of Mr. Justice Miller, in *Ex parte Hebard*,[1] "The consent of "the state being necessary for no other purpose than that "of *plenary jurisdiction* in the federal government, it is "consent to this which is provided for in the constitution." The state having consented that congress may exercise jurisdiction over the territory of the Fort Leavenworth military reservation, the constitution of the United States fixes the character and extent of that jurisdiction, giving congress, and not the state legislature, exclusive legislative control *in all cases whatsoever*. If congress has *exclusive* power to legislate, it does not matter whether it chooses to exercise that power or not to exercise it; the state can not assert either concurrent or partial legislative jurisdiction upon any pretext whatsoever.[2]

The state fully consented that congress might exercise "exclusive jurisdiction" over this territory, but sought, by a repugnant saving clause, to impair the constitutional powers of congress, by reserving to itself partial legislative control over the same territory. This void and illegal saving clause in no manner affected the consent which the state gave, that the United States might hold this territory subject to the legislative control of congress.

The constitution of the United States gave the legislature of the state of Kansas power to consent that the United States might hold this territory for the erection of forts, magazines, arsenals, subect to the control of congress, prescribing, at the same time, the nature of the control which congress shall exercise over such territory. This authority conferred upon the state legislature is a mere naked power to consent or not to consent that he United States

[1] 4 Dill., 380.
[2] Henderson v. Mayor, 92 U. S. 271; Railroad Co. v. Husen, 259, 95, U. S. 465, 471.

may exercise jurisdiction over such territory The legislature in exercising such power has no right or authority to impose terms or conditions, or to make any reservations in favor of the state. The legislature does not grant jurisdiction or power of any kind to congress—the constituion of the United States is the source from which congress obtains its powers; hence, as the legislature confers no power upon congress, in giving the consent provided for in such cases by the constitution, it can reserve none.

In 1794 the state of Virginia consented to the purchase by the United States, of the territory upon which was situated the Armory at Harper's Ferry. In the act ceding jurisdiction, was the following reservation:

"It is hereby declared that this state retains concurrent "jurisdiction with the United States over said place, (so "far as it lawfully can, consistently with the acts before "mentioned), and its courts, magistrates, and officers, may "take such cognizance, execute such process, and discharge "such other legal functions within the same as may not be "incompatible with the true intent and meaning of this "act."

Afterwards the state attempted to exercise concurrent legislative authority within the limits of the ceded territory, by levying a tax against persons resident therein. The question of the right of the state to exercise such authority was referred to Attorney-General Cushing, who, in an elaborate opinion, denied the power of the state to impose any tax on persons or property within the limits of the Armory. In the course of that opinion, referring to the reservation in the act ceding jurisdiction, he said:

"But it is well settled that the sole object and only le- "gal effect of such reservations by the state is to prevent "these places from becoming a sanctuary for fugitives from

"justice for acts done within the acknowledged jurisdiction "of the state. *United States v. Cornell*;[1] *United States v.* "*Davis*.[2] In other respects the exterritoriality of the "Armory at Harper's Ferry, and other like places, is com- "plete in so far as regards the states in which they are.[3]

Attorney-General Bates expresssed similar views in his opinion respecting the New York post-office site. Referring to reservations in the act ceding jurisdiction, he said:

"As to the act of consent by the legislature of New "York, I remark, in the first place, if it do not amount to a "*consent* to the purchase, then it is simply null, and the "United States hold the land without exclusive jurisdiction. "In the second place, if it do amount to a *consent*, then any exceptions, reservations, or qualifications contained "in the act, are void, because, consent being given by the "legislature, the constitution vests in congress exclusive "legislation over the place, beyond the reach both of con- "gress and the legislature of New York. In the last place, "I am of the opinion that the act of the legislature of New "York does consent to the purchase."[4]

The same doctrine was laid down in Sargeant's Const. Law:

"Exclusive legislation signifies exclusive jurisdiction; and "this follows, even though the legislature of the state, in "its act assenting to the purchase, have not expressly ceded "such jurisdiction. It vests in the United States by vir- "tue of the constitution."[5]

An act of the legislature of the state of Ohio ceding jurisdiction over the national asylum for disabled soldiers, contained the following proviso:

[1] 2 Mason, 60.
[2] 5 Mason, 356.
[3] 6 Opinions Attorney-General, 577.
[4] 10 Opinions Attorney-General, 577.
[5] Sarg. Const. Law, 354.

"And, provided, further, that nothing in this act shall be "construed to prevent the officers, employes, and inmates "of said asylum, who are qualified voters of this state, "from exercising the right of suffrage at all township, "county, and state elections, in the township in which said "national asylum shall be located."

The Supreme court of Ohio held, in the case of *Sink v. Reese*,[1] that this proviso was in conflict with the constitution of the United States, and that the cession vested in congress exclusive jurisdiction over the asylum in all cases whatsoever.

Chancellor Kent justifies the reservation of the right to serve process within the ceded territory on the ground that an officer of the state, while serving process within the ceded territory is to be considered *quoad hoc*, an officer of the United States.[2]

Even though the consent to the acquisition of territory for the purposes mentioned in the constitution be treated as a grant of jurisdiction, still the reservation in the act under consideration is void both because it is illegal and because it is repugnant to the grant. It has sometimes been said that when a *proviso* in an act is repugnant to the purview of the act, the proviso must stand, and be held to be a repeal of the purview, but the uniform holding is, that a *saving clause* must, when repugnant to the purview of the act, be rejected. But the better rule is, that in either case the purview should be sustained, and the repugnant proviso or saving clause rejected. It is said in Dwarris on Statutes:

"It is difficult to see why the act should be destroyed by one and not by the other; or *why the proviso and the saving*

[1] 19 Oh. St. 306. [2] Kent's Com., 430.

clause, when inconsistent with the body of the act, should not both of them be equally rejected. The distinction in the effect and operation of a saving clause and of a proviso in a statute, will be found in the books, laid down as positive, and without qualification; but the reason of the distinction, is certainly not very apparent." [1]

Similar language is used in Kent's Commentaries:

"A saving clause in a statute *is to be rejected*, when it is "directly repugnant to the purview or body of the act, "and could not stand without rendering the act inconsist-"ent and destructive of itself." [2]

"A saving in statute is only an exemption of a "special thing out of the general things mentioned in the "law; but a saving clause in a statute, where it is directly "repugnant to the purview or body of the act, and cannot "stand without rendering the act inconsistent and destruc-"tive to itself, is to be rejected." [3]

"A *saving* in a statute is only an exception of a special "thing out of the general thing mentioned in the statute." [4]

"A *proviso* * * * in deeds and laws is a limitation "or exception to a grant made or authority conferred; the "effect of which is to declare, that the one shall not op-"erate, or the other be exercised, unless in the case "provided." [5] It is in the nature of a condition that a certain thing shall or shall not be done, in order that an agreement or provision contained in another clause shall take effect. [6]

[1] Potter's D'warris, 118.
[2] 1 Kent's Com., 12th Ed., * 464 [547].
[3] Sedgwick Constr., Stat. and Const. Law, 2d Ed., 47.
[4] Potter's Dwarris, 117.
[5] Vorhees v. Bank of United States, 10 Peters, 471.
[6] Bouv. Dict. Tit. *Proviso.*

The saving clause in this statute is not in the nature of a proviso or a condition, but it would not make any difference if it were. "Conditions are not sustained when "they are repugnant to the nature of the estate granted, "or infringe upon the essential enjoyment and independent rights of property." [1]

"It is a general principle in the construction of statutes "that a proviso or saving clause, which is directly repug- "nant to the purview or body of the act, is not to have "effect." [2]

But whatever the rule may be in respect to provisos or grants upon conditions repugnant to the purview of the act, it is elementary and unquestioned law that a repugnant or illegal saving clause does not render the whole act void.

In its opinion in this case, the Supreme court of Kansas said: "It does not appear that this act of the legislature "was passed at the solicitation, or even at the suggestion, "of any officer or officers of the United States; but even "if it had been, still such solicitation or suggestion would "have been absolutely and utterly nugatory for all legal "purposes, unless it came from some officer or officers "exercising the sovereign power and authority of the "general government." [3]

The legislature was memorialized by the Secretary of War, and this was conceded in the argument of the Attorney-General of the state of Kansas. If any congressional action was necessary to authorize the President to procure the consent of a state in such a case as this

[1] 4 Kent's Com. 131 [135]; Mason v. Boom Co. 3 Wall Jr. 252; Haight v. Keokuk 4 Iowa, 199, 210.

[2] Dugan v. Bridge Co. 27 Penn. St. 309.

[3] 27 Kas. 756, Record 10, fo. 14.

such authority was given by the act of April 28, 1828 which provides:

"The President of the United States is authorized to "procure the assent of the legislation of any state, within "which any purchase of land has been made for the "erection of forts, magazines, arsenals, dock-yards and "other needful buildings, *without such consent having been obtained.*" [1]

And since 1841, a law has been kept on the statute books of the United States forbidding the expenditure of any money upon any site of land purchased by the United States for the purpose of erecting thereon any public building, "until the consent of the legislature of the state "in which the land or site may be, to such purchase, has "been given." [2]

In *Ex prate Hebard*, [3] where this cession was called in question, Mr. Justice Miller said:

"It is also argued that some act of congress assuming "this jurisdiction is necessary, even if the statute of "Kansas be valid; but I am of the opinion that when the "*locus in quo* is under the control of the United States and "is used as a fort, magazine, or other purpose mentioned "in the constitution, the laws of the United States, framed "for such places, become the law of these places upon the "consent of the state lawfully given for that purpose."

This cession of jurisdiction was asked because the United States was about to erect expensive public buildings on the territory, and no money could be lawfully

[1] Rev. Stat. U. S. 324, Sec. 1838.
[2] Rev. Stat. 1878, 60 Sec. 355.
[3] 4 Dill. 384.

expended for that purpose without the consent of the state legislature given by this act. Congress has since, from time to time appropriated large sums of money for the erection of such buildings. No formal acceptance of the consent given by the legislature was necessary.

It was also contended by the supreme of Kansas that the section of the constitution under consideration "does not seem to be applicable to the present case." The same objection was made in *Ex parte Hebard*, but it was held otherwise. Mr. Justice Miller said:

"This consent may be given whether the land is pur-
"chased in the common meaning of that word or not, and
"may be given either before or after title is acquired by
"the United States. The elements necessary to render
"valid this consent to the exercise of federal jurisdiction
"are, title in the United States and possession for one of
"the purposes mentioned in the constitution." [1]

That is the construction given this section by the act of April 28, 1848, [2] and which has obtained ever since.

It was further urged by the supreme court of Kansas that "It is not necessary that the general government should "exercise exclusive jurisdiction over military reservations."

That is, doubtless, true. But the constitution provides that where the consent of the state is obtained congress shall exercise exclusive jurisdiction, in all cases whatsoever. No room is here left for construction. The wisdom of this constitutional provision is not a matter to be considered. That question was settled when the constitution was adopted. When "exclusive" can be construed to

[1] *Ex parte* Hebard, 4 Dill. 384, 385.

[2] 4 U. S. Stat. at Large, 264; Rev. Stat. 324, Sec. 1838.

mean "partial," and "in all cases whatsoever" to mean "in some cases," then the views advanced by the supreme court of Kansas will be more tenable.

It was further contended by the supreme court of Kansas that "congress has not shown a willingness to exercise exclusive jurisdiction over the ceded territory." [1] We are not aware that congress has shown a willingness to exercise exclusive jurisdiction as to any special tract of ceded territory, except the District of Columbia, but it has manifested an intention to assert exclusive jurisdiction generally over all such territory. Such jurisdiction is asserted in the chapter relating to crimes arising within the maratime and territorial jurisdiction of the United States. [2]

It is not true that the United States has not parted with anything, or changed its condition because of this act, It has expended large sums of money in public buildings which would not, and could not lawfully have been expended without the act. It is true that it still owns these improvements, but if this act is invalid, it has not the exclusive jurisdiction over them which it supposed it had when it made the expenditures. But we do not think it at all important in construing this act or the constitution of the United States, to determine just how much the state or the United States will lose or gain by any particular construction. But as a matter of fact the money expended by the United States in making improvments and in maintaining its military establishment on this reservation is of vastly more importance to the state and county in which it is situate than the mere pittance of taxes which could be gathered from property owned by railroad and bridge companies.

[1] 27 Kas. 760, Record, 13, fo. 16. [2] Rev. Stat. 1878, p. 1038, Sec. 5339, *et seq.*

There is nothing equitable in the claim made by the state. If it has surrendered jurisdiction for all other purposes except to collect taxes, such taxes would be levied upon persons having no representation, and upon property to which the state laws afford no protection. There would be just as much justice in taxing the property of corporations situate in the counties across the Kansas border in neighboring states, for its benefit, as for the state to collect a tax on property in this territory, after it had given up all right to exercise other jurisdiction there. The right to tax the people of a ceded territory is not often asserted.

We do not understand that it is or will be claimed, on this record, that the payment of these taxes was voluntary. If the taxes were invalid the right to recover back the amount paid, under the circumstances stated in the petition, is clear.[1]

THOS. F. WITHROW,
M. A. LOW,
For Plaintiff in Error.

[1] Kansas Pacific R. Co. v. Comm'rs of Wyandotte Co. 16 Kas. 587; Waubaunsee Co. v. Walker, 8 Kas. 431, 436; State Tonnage Tax Cases, 12 Wall. 209; State to use, &c., v. Shacklett, 37 Mo. 281; Atwell v. Zluff, 26 Mich. 118.

There is nothing equitable in the claim made by the state. If it has surrendered jurisdiction for all other purposes except to collect taxes, such taxes would be levied upon persons having no representation, and upon property to which the state laws afford no protection. There would be just as much justice in taxing the property of corporations situate in the counties across the Kansas border in neighboring states, for its benefit, as for the state to collect a tax on property in this territory, after it had given up all right to exercise other jurisdiction there. The right to tax the people of a ceded territory is not often asserted.

We do not understand that it is or will be claimed, on this record, that the payment of these taxes was voluntary. If the taxes were invalid the right to recover back the amount paid, under the circumstances stated in the petition, is clear.[1]

Thos. F. Withrow,
M. A. Low,
For Plaintiff in Error.

[1] Kansas Pacific R. Co. v. Comm'rs of Wyandotte Co., 16 Kas. 587; Waubaunsee Co. v. Walker, 8 Kas. 431, 436; State Tonnage Tax Cases, 12 Wall. 204; Stimpson use &c. v. Shacklett, 37 Mo. 281; Atwell v. Zhuff, 26 Mich. 118.

114-585

IN THE

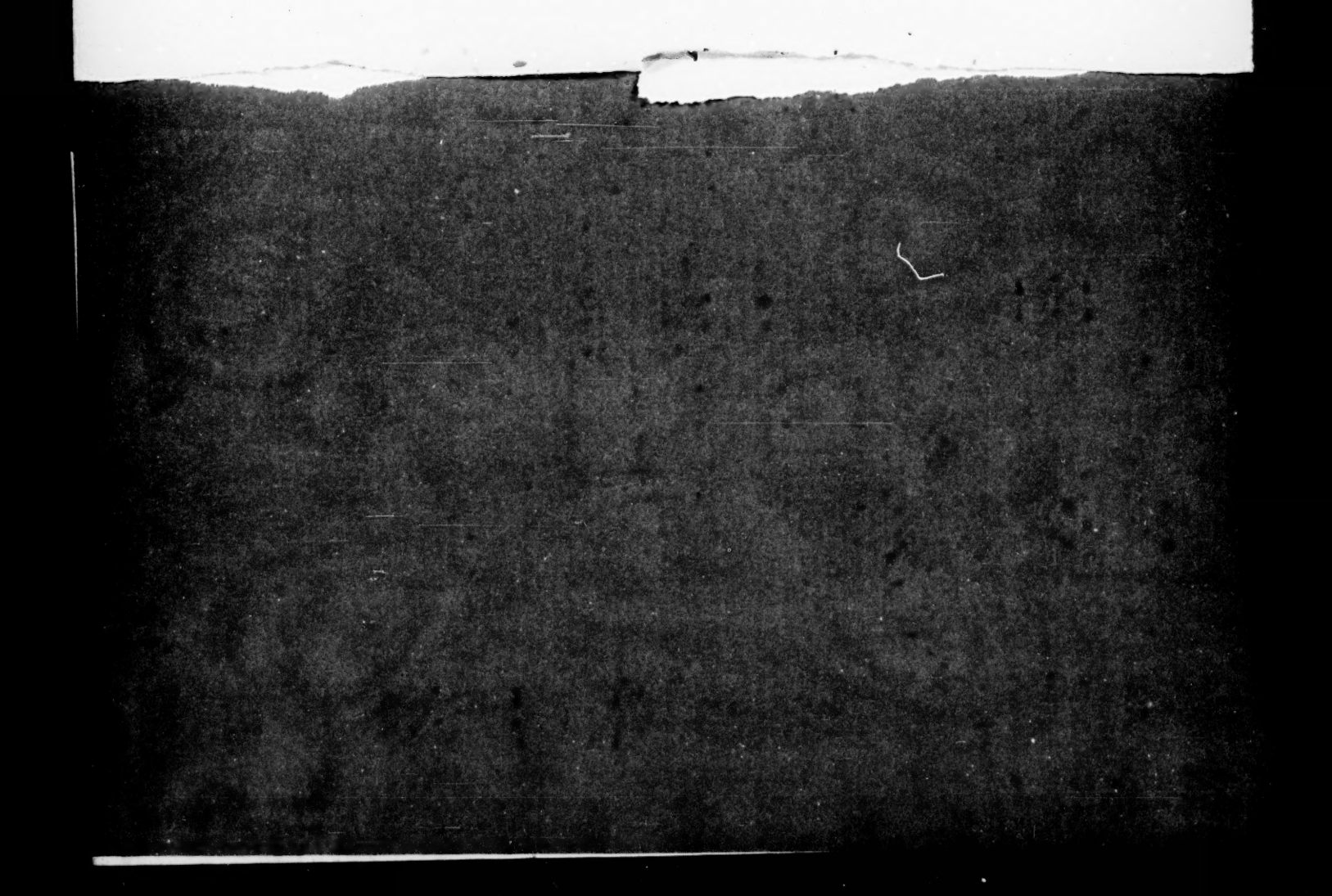
Supreme Court of the United States.

FORT LEAVENWORTH RAILROAD CO.,
vs.
P. G. LOWE, *Sheriff of Leavenworth County.*
No. 243.

RIGHT OF THE STATE OF KANSAS TO TAX RAILROAD PROPERTY BELONGING TO A PRIVATE CORPORATION SITUATED WITHIN THE BOUNDARIES OF THE FORT LEAVENWORTH MILITARY RESERVATION.

BRIEF OF W. HALLETT PHILLIPS,
For Defendant In Error.

R. O. Polkinhorn & Son, Printers.



IN THE SUPREME COURT OF THE UNITED STATES.

THE FORT LEAVENWORTH RAILROAD COMPANY
vs.
P. G. LOWE, *Sheriff of Leavenworth County.*
No. 243.

Brief of W. Hallett Phillips for Defendant in Error.

The question involved this case, is as to the authority of the State of Kansas to subject to taxation the property of the defendant, a railroad corporation organized under the laws of Kansas, and entirely situated within the boundaries of the Fort Leavenworth military reservation, in that State.

The suit was one brought by the company in the State court against the defendant, to recover back the amount which he had collected from the company for taxes levied by the county of Leavenworth, and which the company had paid under protest. There was a demurrer filed by the defendant upon which judgment went against the company.

On appeal this judgment was affirmed by the Supreme Court of Kansas, and the plaintiff sued out a writ of error to this court.

The petition states that plaintiff's road was built "with the consent, acquiescence and permission of the Government of the United States, on said military reservation."

That the Government of the United States accepted the rights and privileges given under the act of the State of Kansas, approved February 25th, 1875.

That all the property of the plaintiff is situated on the military reservation and is exempt from taxation, and that the State of Kansas had no jurisdiction to tax said property.

The act of Kansas which lies at the basis of this controversy, is entitled, "An act to cede jurisdiction to the United States over the territory of the Fort Leavenworth military reservation."

"SECTION 1. That exclusive jurisdiction be, and the same is hereby, ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth reservation, in said State, as declared from time to time by the President of the United States, saving, however, to the said State the right to serve civil or criminal process within said reservation, in suits or prosecutions for or on account of rights ac-

quired, obligations incurred, or crimes committed in said State, but outside of said cession and reservation; *and saving further to said State, the right to tax railroad, bridge and other corporations, their franchises and property on said reservation.*

Laws Kansas, 1875, p. 95.

The determination of the case depends upon the construction given to the reservation in the act, of the right of State taxation.

We maintain that the reservation was such as the State had a right to make and the United States to accept.

The Constitution provides, (Art 1, sec. 8), that Congress shall have power to exercise exclusive jurisdiction in all cases whatsoever over such District (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings."

The land in question were never purchased with the consent of the State of Kansas. It was held and used by the United States as a military reservation at a time when Kansas was a territory. The history of the reservation is given in *United States* vs. *Stone*, 2 Wall., 525.

When Congress passed the act (Jan. 29, 1861,) admitting Kansas into the Union, this reservation was included within the boundaries of the State. Kansas was admitted on an equal footing with the original States. The only territory not made subject to the State jurisdiction, was that of Indian tribes having treaties with the United States, which provided that without their consent, such territory should not be subject to State jurisdiction.

Accordingly, while the title to and use of the reservation remained in the United States, the political jurisdiction passed to the State of Kansas.

To restore the Federal jurisdiction, over the land, the consent of the State to a cession of its jurisdiction was necessary. So much we do not understand is disputed, and is supported by abundant authority.

12 *St.*, 126.
Ex parte Hebard (Miller, J.), 4 Dill, 384.
14 Opinions Att'y-Generals, 33.
United States vs. *Ward*, 1 Woolw, 17.

The cession of jurisdiction can only be by the free act of the State. Unless granted as prescribed by the act of 1875, it was not granted at all.

If the consent of the State must be obtained, cannot the State stipulate the terms of the grant?

The plaintiff in error denies that the reservation of the right to tax possessed any validity, but insists that the act of 1875 must be construed as conferring exclusive jurisdiction upon Congress, without any reservation.

In other words, that the terms upon which the State gave its consent to the jurisdiction of Congress, may be disregarded and still make that consent effective.

It has almost invariably been the practice to stipulate in the acts of cession, various reservations and stipulations in favor of the State or its citizens.

Most generally the acts contain the provision that the process of the State should still run into the territory ceded.

"The acceptance of a cession with this reservation," says Kent, "amounts to an agreement of the new sovereign to permit the free exercise of such process as being *quod hoc* his own process. This construction has been frequently declared by the courts of the United States; *and upon any other construction the cession would be nugatory and void.*

1 Kent, Com. 430.

The contention of the plaintiff in error is not that the cession contained in the Kansas Act is void, but that the reserved power to tax, is invalid. In the petition it is expressly averred "that said Government of the United States accepted the rights and privileges, and has ever since exercised such right and privileges as were given under said, act, approved February 25, 1875." Plaintiff in error would retain one portion of the act while discarding the other. This we submit can no the done. The act must either stand or fall as a whole.

But upon what ground can it be truly said that the reservation conflicts with the exclusive power of Congress, over the territory ceded?

What the State does in the way of taxation is not by virture of her paramount powers as a State, but by virtue of the permission and sanction of the paramount sovereign, the United States. The very fact that it was made a matter of agreement with the United States, demonstrates this.

It is by virtue of that agreement alone that the State had authority to levy the taxes, which are now in question.

The acceptance of the agreement by the Federal Government is tantamount to an express grant of the right to tax, to the State.

We submit that it was as competent for the Government to accept the reservation, as for the State to make it.

As stated in the Federalist, the reason for the power in Congress of exclusive legislation, is, that it would not be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it.

Fed., 43.

This principle of exclusive jurisdiction is not considered to conflict with the application to such property by way of reservations in the ceding acts, of State laws, not at all endangering the use or object for which it is held by the United States.

U. S. vs. *Ames*, 1 Wood & Min., 86.

It is not pretended that the tax in question conflicts in any degree with what has been required or provided by the general government.

Nor does it in any way hinder Congress from accomplishing the objects of the power contained in the constitution. If it did, Congress would not have been slow to have so announced.

It is a fact to be noted that the party complaining that the State has trespassed on the rights of the general government, is not that government itself, but a private corporation created by th eState of Kansas, and existing on the property of the United States only by acquiescence.

When a party sought to recover back the amount collected by the State for taxes in Alexandria, on the ground that the United States had no right to retrocede that part of the District of Columbia, this Court held that he had no right to raise the question, nor force upon the parties to the compact an issue which neither of them desired to make.

Phillips vs. *Payne*, 92 U. S., 134.

The corporation occupies no different position from that occupied by all citizens of Kansas who may now, or who may in the future, reside upon the land.

According to plaintiff's view, once upon that territory with the acquiescence of the United States, they escape all State taxation.

The question of the validity of reservations contained in ceding acts, has frequently received the

consideration of the General as well as of the State governments.

The subject was brought to the attention of Attorney-General Devens in the case of Fort Porter. In that instance, the reservation made by the State of New York was, "reserving a free and uninterrupted use and control in the Canal Commissioners for all that may be necessary for canal and harbor purposes." The act also provided for a cession of jurisdiction over the land. The reservation was held valid in so far as it did not interfere with the use of the land for military purposes.

16 Opinions Attorney General's, 593.

In 1841, the Massachusetts Legislature requested the opinion of the Judges of the Supreme Court of that State, on the general questions of the status of the places ceded by the State to the United States, and whether persons residing upon such ceded places were amenable to the taxing laws of the State.

In their opinion the judges say it is hardly practicable to state a general answer, because the question may depend somewhat upon the construction of the different acts by which jurisdiction had been ceded by the Commonwealth to the United States, for various purposes, and these acts differed essentially from each other.

They instance that in two acts ceding to the United States a tract of land for the erection of a Marine Hospital at Chelsea, there is an express pro-

viso and reservation, that all persons who may remove upon said territory shall be deemed inhabitants of Chelsea, to enjoy the privileges and subject to the duties of such inhabitants.

They say that perhaps a careful analysis would show "that if the object of the cession be of a civil nature the assent of the State is limited and qualified by such reservation as the legislature ceding the jurisdiction, may think expedient for the safety and convenience of their own citizens."

Their opinion was that unless the assent of the State was expressly made conditional, the jurisdiction ceded, was an exclusive jurisdiction and therefore the laws of the State did not apply.

Opinion of the Judges, 1 Metc., 580.

The jurisdiction in the case we are considering rests upon the same ground as that over the district ceded to the United States for the seat of government.

In the Maryland act of cession of 1791, it is provided—

> "That the jurisdiction of the laws of this State over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until Congress shall by law provide for the government thereof under their jurisdiction."
>
> 2 Kilty Laws Md., 1791, Ch. L.

Congress accepted the cession with this reservation, for, by the act of July 16, 1790, it is provided

"that the operation of the laws of the State within such district shall not be affected by this acceptance until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." 1 St., 130.

The act of February 27, 1801 provides, "that the laws of the State of Maryland, as they now exist shall be and continue in force in that part of the said District which was ceded by that State to the United States, and by them accepted as aforesaid."

2 St., 103.

These citations, we think, suffice to show the practice of the States and the General Government as regards reservations in the acts of cession.

The Supreme Court of Kansas, in its opinion, suggests whether, under the Constitution, Congress should not take some action before jurisdiction can pass from the State to the Federal Government.

That it would seem that the Legislature of the State could not cut off territory from the State and force it into the jurisdiction of the Federal Government, or else place such territory outside of all jurisdiction. The court cites *In re* O'Connor, 37 Wisc., 379. The opinion concludes:

> "The State of Kansas had no power prior to the passage of the act, nor has it had since, to tax the military reservation or anything belonging to the United States thereon, but it

> has the power to tax the vast amount of railroad and bridge property which was then and is now situated upon said military reservation. We think the State has power and authority to tax railroad property belonging to a private corporation, situated exclusively within the boundaries of the Fort Leavenworth military reservation, and that is all we now wish to decide."
>
> 27 Kans., 756.

No question as to the right to recover back the amount paid for taxes was considered by the court below, or can be considered by this Court.

We submit that the judgment should be affirmed.

W. HALLETT PHILLIPS.